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No. 91-779

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

BURLINGTON NORTHERN RAILROAD COMPANY,
Petitioner,
v.
WILLIAM D. FORD,
Respondent,

BURLINGTON NORTHERN RAILROAD COMPANY,
Petitioner,
v.
THOMAS L. JOHNSON,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Montana

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RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

The question presented by this case is not as broad as suggested by petitioner. Petitioner alleges an equal protection violation between resident and non-resident corporations. However, the more accurate question is whether the pertinent venue statute violates the Equal Protection Clause as applied to an FELA case filed in Montana state court.

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RESPONDENTS' BRIEF IN OPPOSITION

The respondents, William D. Ford and Thomas L. Johnson ("injured railroaders" or "respondents" herein), respectfully request that this Court deny the petition for writ of certiorari, seeking review of the decision and order of the Supreme Court of the State of Montana entered in the above cases on August 12, 1991.

RESPONDENTS' STATEMENT OF THE CASE

The true scope of this case is best understood by examining what the issue actually is—and what it is not.

This *is* a case involving a foreign corporation, a non-resident plaintiff, and a statute which on its face treats a foreign corporation differently for venue purposes than it would otherwise he treated if it were a domestic corporation.

However, this is *not* a case involving a venue question in a garden-variety transitory action.

This case is *solely* a venue question in an FELA case.

Additionally, seemingly well-intended and soporific arguments aside, this case represents nothing more than a new tack being tested by BN in its tireless efforts to chip away at the liberal rights expressly granted injured railroaders by the United States Congress. Over the past thirty years, BN has made no less than six (6) unsuccessful attempts in the Montana Supreme Court to deprive injured railroaders of their liberal rights of forum selection through the attempted use of the doctrine of *forum non conveniens*. Having been defeated on all previous occasions, BN is now attempting an "end run" by attacking the Montana venue statutes on constitutional grounds.

A. The Montana Venue System

It is questionable whether or not MCA § 25-2-118 could pass constitutional muster for the manner in which it distinguishes between residents and non-residents in an ordinary transitory action. However, this is neither the time nor the place to make such a determination. Since this is an FELA case, the only question appropriate for consideration is whether the Montana venue system is constitutional as it applies to this FELA case.

B. The Proceedings Below

The recitation contained in the petition outlining the proceedings below is fairly accurate, with two notable exceptions.

First, the underlying actions *were* brought in a "selected" Montana state court. Petitioner obviously is attempting to attach a negative connotation to the fact that the court was "selected." Nevertheless, whether petitioner likes it or not, the FELA has long afforded injured railroaders, and other workers falling under the coverage of the Act, the ability to "select" the forum in which their action is to be heard.

Second, petitioner's interpretation of the Montana Supreme Court's ruling in this case is, at best, highly skewed—at worst, erroneous. Particularly, and perhaps most importantly, petitioner claims that the Montana Supreme Court "specifically declined to address the equal protection issue raised by BN—whether the Montana venue statute has 'a rational basis for treating out-of-state corporations differently from domestic corporations . . .'" As explained below, this statement is patently false.

REASONS WHY THE PETITION SHOULD BE DENIED

Pursuant to Rule 10, a petition for writ of certiorari will be granted *only* when there are *special and important* reasons therefor. BN bases their petition on a lack of agreement between state supreme courts as to whether discrimination in state court venue against out-of-state corporations violates the Equal Protection Clause. However, the real issue in this case is whether the Montana venue statutes pass constitutional muster as they apply to non-resident defendants *in FELA actions*. With regard to this issue, no conflict exists between any of the state supreme courts or the United States Courts of Appeals. Accordingly, no special or important reasons exist to grant BN's petition for a writ of certiorari.

I. BN HAS MISCONSTRUED THE REASONING BEHIND THE MONTANA SUPREME COURT'S DECISION IN THIS CASE

The full text of the Montana Supreme Court's decision in this case is set out in Appendix A in BN's petition (BN App. 1a to 15a). Nowhere in such decision does it state, or much less imply, that the Montana venue statute is beyond the reach of the Equal Protection Clause. However, the Montana Supreme Court found the liberal forum policies underlying the FELA to constitute a rational basis for the disparate treatment of BN in this case under Montana's venue laws. *See* BN App. 9a-11a.

The Montana Supreme Court's decision was based on the following:

> 1. *Cincinnati St. Ry. v. Snell*, 103 U.S. 30, 24 S.Ct. 319, 48 L.Ed. 604 (1904), holds that the Fourteenth Amendment safeguards only fundamental rights and does not guarantee the right to have disputes determined in one forum, as opposed to another;
>
> 2. *Power Mfg. Co. v. Saunders*, 274 U.S. 490, 47 S.Ct. 678 (1927), is not controlling for several reasons:
>
> > a. *Saunders* is distinguishable on its facts since in that case, the defendant did no business in the county where venue was established. In this case, BN admittedly does business in Yellowstone County.
> >
> > b. In *Saunders*, plaintiff's action was brought pursuant to the common law of the State of Arkansas. In this case, the injured railroaders' claims are based upon federal statutory law which was designed to provide injured railroad workers with as many options as possible when choosing venue.
> >
> > c. *Saunders* did not preclude disparate treatment under a state's venue laws where a rational

basis could be shown for such treatment such as the national policy underlying the FELA which allows railroad workers greater flexibility when choosing a forum than other litigants.

d. Subsequent decisions by the U.S. Supreme Court raise a question whether *Saunders* continues to be good law. (The Montana Supreme Court discussed the perceived effect of *Bain Peanut Co. v. Pinson*, 282 U.S. 499, 51 S.Ct. 228, 75 L.Ed. 482 (1931), and *American Motorists Ins. Co. v. Starnes*, 425 U.S. 637, 96 S.Ct. 1800, 48 L.Ed.2d 263 (1976), and also noted that the challenged statute in this case is nondiscriminatory in its operation.)

Although the Montana Supreme Court based its decision on "all of the above reasons," its decision was *particularly based* on the "strong national policy favoring a plaintiff's selection of forum in actions brought under the Federal Employers Liability Act." BN App. at 15a. Specifically, the Montana Supreme Court stated:

> Without addressing the greater issue of whether there is a rational basis for treating all out-of-state corporations differently from all domestic corporations, it does appear that there is a *commonly accepted historic justification* for allowing railroad workers greater flexibility when choosing a forum than other litigants. * * * (BN App. at 9a, emphasis added.)

Also:

> It is clear then that *national policy*, dating back to 1910, which was intended to address the dangerous working conditions of railroad workers and to facilitate recovery for families of injured workers, favors a policy of allowing railroad workers to sue their employer at any location where the employer does business. *That national policy presents a justification for disparate treatment in this case*, which was not present in the *Saunders* case. (BN App. at 11a, emphasis added.)

The statements in BN's petition to the effect that the Montana Supreme Court specifically declined to address the equal protection issue are patently false. The decision is eminently clear that the national policy underlying the FELA provides a rational justification for disparate treatment of the foreign corporation in this case.

II. BN'S "FORUM-SHOPPING" ARGUMENTS HAVE NO APPLICATION TO THIS CASE

Presumably as a carry-over from its attempts to utilize the doctrine of *forum non conveniens* in Montana state court FELA cases, BN's brief is peppered with buzzwords and phrases such as: "virulent," "abusive," and "extreme" forum-shopping; "arbitrary" and "unwarranted" localism; "torrent" of FELA claims; and "gross discrimination" and "prejudice" experienced by BN.

By repeated use of such words and phrases, BN attempts to obscure the incontrovertible fact that forum-shopping is *expressly sanctioned* under the FELA.

Additionally, petitioner purports to demonstrate the emergence of "some significant trends" regarding state court FELA filings through certain "statistics." (BN App. 27a-44a) However, BN's "statistics" are not only irrelevant, but also misleading.

Montana is an extremely large and sparsely-populated state. The two largest cities in Montana are Billings and Great Falls. As reflected by BN's "statistics," the great majority of the FELA cases against BN in Montana state courts have been filed in Yellowstone and Cascade Counties, the counties in which Billings and Great Falls are located. Notwithstanding the fact that the bulk of Montana's lawyers are located in these two counties, equally prevalent is the concentration of medical facilities.

In the instant case, the injured railroaders are both residents of Sheridan, Wyoming, and were injured in or around BN facilities in that city. Sheridan is approxi-

mately 100 miles southeast of Billings, Montana. The Billings medical community provides health care services over a four-state area through its sixteen clinics, over 200 physicians, and two modern hospitals. Following their injuries, both injured railroaders were treated (and continue to be treated) by Billings physicians.

From the standpoint of personal injury litigation, facilitating the attendance of diagnostic, treating and consulting physicians, not only for consulting and discovery purposes, but also for purposes of testimony at trial, is of paramount importance. As a result, it is obviously preferable for the litigation to take place in a locale where the attendance of physicians, therapists, counselors, etc., can be facilitated.

There are two principal east-west railroad routes traversing the State of Montana, the "north route" and the "south route." The "north route" hugs the Canadian border in the northern part of the state, running through the City of Havre, the present base of BN's operations in Montana. From the standpoint of medical care, facilities in Great Falls (Cascade County) and Kalispell (Flathead County) provide advanced medical care for the "north route." For the "south route" (as well as various trackage located in the northern part of Wyoming) the Billings (Yellowstone County) medical community provides advanced medical care. Viewed within this framework, the "statistics" as to FELA state court filings obviously reflect practical considerations as opposed to "virulent forum-shopping." It is an unfounded leap of abstraction for BN to suggest that the Yellowstone and Cascade County courts and their juries have become "powerful magnets" for FELA claims. First, there is no evidence that Yellowstone and Cascade County juries render "enhanced verdicts" against FELA defendants. Second, and perhaps more importantly, *very few* FELA

cases filed in Montana state courts every reach a jury—all but a scintilla are settled prior to trial.[1]

In conclusion, BN's suggestion that "litigants are skillfully exploiting the discriminatory provisions of the Montana venue statute" is utterly belied by the common sense practicalities associated with conducting personal injury litigation in a sparsely-populated state where advanced medical facilities are highly concentrated.

Last, BN alleges that the great majority of FELA cases against BN in Montana state courts present "no connection whatever" to the county of venue. First, this statement is erroneous from the standpoint that an obvious and legitimate connection exists vis-a-vis the location of medical and rehabilitation personnel. Second, BN's statement is irrelevant from the standpoint that the FELA expressly sanctions the broad availability of forums for an injured railroader. In this regard, the legislative history of the FELA is illustrative:

In reporting the FELA bill out of committee, Senator Borah stated his objection to the pre-FELA law as follows:

> Plaintiff may sometimes be compelled to go a great distance in order to have his cause of action against the defendant by reason of the fact that now the action must be brought in the district in which the defendant is an inhabitant . . .
>
> . . . If this bill should be passed the law will be remedied in that respect, enabling the plaintiff to bring his action where the cause of action arose or where the defendant may be doing business. The bill enables the plaintiff to find the corporation at any point or place where it is actually carrying on business and there lodge his action, if he chooses to do so. 45 Cong.Rec. 4034-4035 (1910).

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[1] Conspicuously absent in BN's "statistics" is any data to reflect the ratio between cases settled versus tried before a jury.

In 1947, a bill known as the "Jennings Bill" was proposed which would have repealed most of Section 6 and limited the forum choices of injured railroad workers to the district where the cause of action arose or where the plaintiff resided. H.R. 1639, 80th Cont., 1st Sess. (1947). However, the bill did not pass. Accordingly, the strength of the policy behind Section 6 can further be gleaned from Congress's refusal to pass the Jennings Bill.

Under the FELA, Congress has given the injured worker broad discretion in his choice of forum in which to have his claim tried. It cannot be seriously disputed that the forum provisions of the FELA resulted from a recognition of the enormous disparity between the respective positions of the injured railroaders and powerful interstate railroads. Additionally, the liberal venue provisions were obviously designed to enable an injured railroader to have his case heard in a more "neutral" setting where most of the jury panel was not likely to be railroad employees or relatives or dependents of railroad employees. By seeking to require injured railroaders to file suit in Hill County, BN is attempting to do exactly what the FELA was designed to avoid, i.e., forcing the injured railroader to file suit in a "railroad town."

III. THE MONTANA SUPREME COURT'S HOLDING IN THIS CASE IS LIMITED TO FELA ACTIONS IN STATE COURT

Assuming, arguendo, that MCA § 25-2-118 has the effect of unfairly discriminating against foreign corporations in non-FELA cases, the policy favoring the injured railroader's choice of forum under the FELA, and the "open court policy" of the State of Montana, mandate that the injured railroaders' choice of forum should be left undisturbed in the present case.

As indicated above, under the FELA, Congress has expressly given the injured railroader broad discretion in his choice of forum in which to have his claim tried.

It is beyond dispute that with the enactment of the FELA, Congress consciously decided to give an injured railroader *greater* rights in terms of venue selection than other injured parties. As a result, corporations that are subject to the FELA are treated different from corporations that are not subject to the FELA. By definition, railroad employers were therefore denied equal protection under the law. However, in enacting the FELA as an attempt to remedy the historical practices of the nation's railroads in refusing to compensate injured workmen, a rational basis exists to justify the different treatment given interstate railroads. It is similarly obvious that Congress was intimately aware of the disparity between large interstate railroad companies and injured railroaders. As a result, Congress chose to shift the burden of the loss from "those least able to bear it" and place it on those who can "measurably control their losses."

Notwithstanding the clear legislative and judicial mandates that the FELA be given a liberal construction in favor of injured railroad employees, BN has continually attempted to curtail the injured railroader's rights under the FELA. This case represents another example of BN's long string of attempts to chip away at the foundation of the liberal pro-worker policies of the FELA. Although the FELA continues to be a bitter pill for the railroads to swallow, why it is that they refuse to take their medicine and learn to live with it? Since otherwise identical procedural and substantive law would apply to this case whether it was tried in Yellowstone County or Hill County, one is forced to a conclusion that the BN is engaging in obstructionist tactics intending to deter and frustrate present and future plaintiffs. However, these are the types of tactics that promoted Congress to enact the FELA in the first place.

It is respectfully submitted that in deference to the congressional and judicial mandates of the FELA, the Montana Supreme Court properly construed the Montana venue statutes. Such a construction was consistent with

the liberal policies underlying the FELA, which undeniably were intended to provide an advantage to the injured railroaders when forced to do battle against railroad "Goliaths."

A liberal construction of the venue statutes in favor of injured railroad employees also comports with Montana's "open court policy." Article II, section 16 of the Montana State Constitution provides that "courts of justice shall be open to every person, and speedy remedy afforded for every injured person, property or character."

Statutes can also be saved from constitutional infirmity by showing that *in actual practice* discriminatory results do not occur. In *theory*, MCA § 25-2-118 appears to sanction venue in a county far removed from where BN conducts business. However, *in practice*, BN is not sued in a county where they cannot "be found" doing business. Accordingly, any discriminatory effect is nothing more than theoretical and insufficient to invalidate the statute.

Last, BN is without standing to challenge the constitutionality of the venue statutes in non-FELA situations. The inquiry in this case must be limited to whether the venue statutes are appropriate in an FELA action.

Pursuant to the foregoing argument and authority, it is the injured railroaders' position that the Montana Supreme Court's decision was correct and well supported.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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